No. 76-1864

In the Supreme Court of the United States

OCTOBER TERM, 1977

SAVE OUR WETLANDS, INC., ET AL., PETITIONERS

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 78a-96a)[1] is reported at 549 F. 2d 1021. The orders of the district court dismissing petitioners' complaint for permanent injunctive and declaratory relief (Pet. App. 59a-77a) are unreported. The Special Master's report and recommendation (Pet. App. 1a-30a) and first supplemental Special Master's report and recommendations (Pet. App. 31a-58a) are unreported.

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[1]Petitioners did not paginate their appendix. In order to refer to specific portions of the appendix, we have designated the pages after Pet. 18 as 1a through 98a.

JURISDICTION

The judgment of the court of appeals (omitted from petitioners' appendix) was entered on April 4, 1977. A timely petition for rehearing and a petition for rehearing *en banc* were denied on May 16, 1977 (Pet. App. 97a-98a). The petition for a writ of certiorari was filed on June 24, 1977. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners' complaint, which sought declaratory and injunctive relief concerning a substantially complete real estate development, was properly dismissed on the ground of laches.[2]

STATEMENT

Petitioners seek review of a decision by the court of appeals holding that the district court properly dismissed their complaint for declaratory and injunctive relief on the ground of laches. The relevant facts are set forth in the opinion of the court of appeals and may be summarized as follows:

[2]The second question presented in the petition (Pet. 3) refers to "admitted violations of Federal Criminal laws [that] have been committed by those invoking the doctrine of laches." Although this point is not developed in the body of the petition, the petition (Pet. 4) does allege that the area was drained in the 1920's and 1960's "in violation of a federal criminal statute, The Refuse Act of 1899, 33 U.S.C. Section 407 * * *." Section 407 declares that it is unlawful to throw, discharge, or deposit refuse matter in navigable waters without a permit. In our view the question whether the original drainage of this area in the 1920's and redrainage in the 1960's by the local government (the St. Tammany Parish Police Jury) was illegal has little relevance to the question presented in this case, which is whether the Eden Isles development should be enjoined pending preparation of an environmental impact statement pursuant to the National Environmental Policy Act (NEPA), 83 Stat. 852, 42 U.S.C. 4321 *et seq.* In fact, NEPA had not yet been enacted when the alleged violations occurred, and there is no suggestion that the development of Eden Isles was in any way involved in the "violations."

Petitioners initiated this action on October 29, 1974, by filing a 49-page complaint alleging numerous grievances against 37 individuals, corporations, and governmental agencies[3] who, petitioners alleged, were partially responsible for causing environmental degradation of Lakes Maurepas, Pontchartrain, Catherine and Borgne, four interconnected bodies of water located in southern Louisiana (Pet. App. 81a-82a). Petitioners' most specific allegation was that the United States Army Corps of Engineers had violated the National Environmental Policy Act, 83 Stat. 852, 42 U.S.C. 4321 *et seq.*, by issuing a permit pursuant to Section 10 of the Rivers and Harbors Act, 30 Stat. 1151, 33 U.S.C. 403, to co-defendant Leisure, Inc. (Leisure), for the dredging of an entrance channel from Lake Pontchartrain to an interior canal system in Eden Isles, a real estate development on the north shore of the lake (Pet. App. 82a).

All of the Eden Isles property is located on reclaimed land[4] in St. Tammany Parish Drainage District No. 2 (Pet. App. 84a). It is divided into two adjacent parcels known as Eden Isles East and Eden Isles West. Leisure

[3]The federal defendants named in the complaint were the United States Army Corps of Engineers, the Environmental Protection Agency, the Department of Housing and Urban Development, and various officers of these agencies (Pet. App. 81a).

[4]The area was originally drained in the 1920's but reflooded in the 1930's when the levees were allowed to deteriorate. The area was again reclaimed between 1962 and 1966, at a cost of almost $2 million, by the St. Tammany Parish Police Jury, a local governmental body (Pet. App. 84a-85a).

acquired the Eden Isles property in January 1969 and began constructing a residential development on Eden Isles West. The development includes a perimeter and interior canal system that will give Eden Isles homeowners water access to Lake Pontchartrain (Pet. App. 85a-86a).

In October 1971 Leisure submitted to the Corps an application under Section 10 of the Rivers and Harbors Act, 33 U.S.C. 403, for a permit to dredge an entrance channel from Lake Pontchartrain to the portal of its canal system (Pet. App. 86a). A revised application was submitted on February 21, 1972. On February 25, 1972, the Corps issued public notice of the permit application (*ibid.*). Subsequently, on March 9, 1973, the Corps, with the concurrence of the Department of the Interior, issued the Section 10 permit to Leisure (Pet. App. 87a). No environmental impact statement concerning the permit was prepared or filed pursuant to the National Environmental Policy Act (*ibid.*).

Petitioners did not file their complaint until October 29, 1974, more than 19 months after the Corps had issued the permit to Leisure (Pet. App. 89a). The district court, upon stipulation, referred the action for trial to a Special Master pursuant to Rule 53, Fed. R. Civ. P. (Pet. App. 82a-83a). On December 19, 1974, the Special Master entered his first report, which recommended that the motion for a preliminary injunction be denied (Pet. App. 29a-30a). After a further hearing, the Special Master submitted a supplemental report recommending that the complaint be dismissed as barred by laches (Pet. App. 57a-58a). Thereafter, the district court, after a hearing on petitioners' objections and their motion for a new trial, overruled petitioners' objections to the master's reports and dismissed the action on the basis of laches (Pet. App. 66a-72a). The court of appeals affirmed (Pet. App. 78a-96a).

ARGUMENT

The decision of the court of appeals, on whose opinion (Pet. App. 78a-96a) we principally rely, is correct and presents no issue of general importance warranting review in this Court.

1. There is no conflict with any decision of this Court, or among the circuits, regarding the applicability of equity doctrines, including laches, to environmental litigation. Indeed, in *Kleppe* v. *Sierra Club*, 427 U.S. 390, 407-408, this Court ruled that "in simple equitable terms, there were no grounds for the injunction: the District Court's finding of irreparable injury to the intervenors and to the public still stood, and there were—on the Court of Appeals' own terms—no contervailing equities." When the facts warranted a finding of laches in an action brought pursuant to the National Environmental Policy Act (NEPA), 83 Stat. 852, 42 U.S.C. 4321 *et seq.*, injunctive relief has been denied. See, *e.g.*, *Shiffler* v. *Schlesinger*, 548 F. 2d 96, 103-104 (C.A. 3); cf. *Ohio* v. *Callaway*, 497 F. 2d 1235 (C.A. 6) (general equity principles applicable in NEPA actions).

The cases petitioners cite (Pet. 13-16) are simply situations where courts held that the particular facts did not warrant a finding of laches. For example, the Fourth Circuit, in *Arlington Coalition on Transportation* v. *Volpe*, 458 F. 2d 1323, 1329, certiorari denied, 409 U.S. 1000, declined to invoke laches "because of the public interest," specifying, "[w]e believe that Arlington I-66 has not progressed to the point where the costs of altering or abandoning the proposed route would *certainly* outweigh the benefits that might accrue therefrom to the general public" (emphasis by the court). The Fifth Circuit has expressly recognized the Fourth Circuit's articula-

tion and applied it in rejecting laches as a bar, in *Ecology Center of Louisiana, Inc.* v. *Coleman*, 515 F. 2d 860, 868.

We now show the support in this case for the court of appeals' recognition of NEPA goals and its conclusion that this suit was barred by laches.

2. The facts of this case demonstrate that the finding of laches was amply warranted. Although petitioners describe the area in question as a "vast but delicate wetlands estuary abundant with all forms of fish fowl and animal life" (Pet. 3), as the court of appeals observed, the construction of dikes, levees, and dams began in 1927, and the area has been dry land—except for a four-week period—since 1966 (Pet. App. 90a). Thus the construction that most drastically altered the area was undertaken "many years" before this suit was filed (*ibid.*).

Construction began on Eden Isles in 1969. The development was conspicuously and heavily advertised—at a cost in excess of $850,000 (Pet. App. 91a)—and the Corps of Engineers issued public notice of Leisure's permit application to numerous individuals, agencies, and the news media (Pet. App. 49a, 86a-87a). Petitioners nevertheless failed to lodge any objection to the permit application, and did not bring this action until more than 19 months after the permit issued. Moreover, they have offered no valid excuse for their delay.

By December of 1974, shortly after this suit was filed, major portions of the development were already 99 percent complete (Pet. App. 88a). Leisure has now spent more than $26 million to develop the project (Pet. App. 94a-95a). Moreover, the Special Master found that between 800 and 900 lots and other property with a value in excess of $18 million had been sold to individuals who were not joined in this litigation (Pet. App. 88a). Finally,

the evidence introduced at trial indicated that the Eden Isles development would have only a minimal adverse environmental impact upon Lake Pontchartrain and connecting waters[5] and, as the court of appeals observed, "preparation of an [environmental impact statement] at this point would produce very little, if any, environmental benefit" (Pet. App. 95a).

In summary, petitioners substantially delayed in filing this action, the delay was not excusable, and it caused undue prejudice to the defendants with no showing of substantial countervailing equities. The finding of laches was fully warranted.[6]

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[5]The factual findings of the Special Master (Pet. App. 33a-53a) were not challenged on appeal. In their petition (Pet. 11-12, 17), petitioners make extensive reference to an environmental investigation prepared by Burke & Associates. This report was not offered as evidence at trial. As the court of appeals observed (Pet. App. 95a), one of petitioners' own witnesses concluded that the Eden Isles development would have a minimal impact on the ecosystem involved.

[6]It should be noted that both the district court and the court of appeals carefully limited the decision to "substantially complete" elements of the development and recognized that any further work must be in compliance with all applicable laws and would be subject to judicial review (Pet. App. 64a, 95a-96a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1977.

DOJ-1977-09